Filed 10/22/15 Cooper v. Lavely & Singer CA2/4

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

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| JEFFREY COOPER,<br><br>Plaintiff and Appellant,<br><br>v.<br><br>LAVELY & SINGER PROFESSIONAL CORPORATION,<br><br>Defendant and Respondent. | B261936<br><br>(Los Angeles County Super. Ct. No. SS023190) |

APPEAL from orders of the Superior Court of Los Angeles County, Gerald Rosenberg, Judge. Affirmed.

Lyle R. Mink for Plaintiff and Appellant.

Lavely & Singer Professional Corporation, Michael E. Weinsten and Paul N. Sorrell for Defendant and Respondent.

In the underlying action, appellant Jeffrey Cooper sought a award of contractual attorney fees incurred in a prior appeal, in which he successfully challenged a confirmed arbitration award on the ground that it contained an improper fee award to respondent Lavely & Singer Professional Corporation (L & S). We affirm the trial court's denial of Cooper's request for a fee award.

## RELEVANT FACTUAL AND PROCEDURAL BACKGROUND

In 2009, Cooper retained L & S to investigate possible claims arising out a business venture. Cooper's legal services contract with L & S contained a clause obliging him to submit all claims arising under the contract to arbitration, and provided for a fee award to the prevailing party. The clause states in pertinent part: "Each and every controversy between the parties hereto regarding any claim of non-performance or breach of the [a]greement, any claim of malpractice or breach of fiduciary duty, and any claim concerning the validity or enforceability of this [a]greement[] shall be referred to mandatory arbitration . . . . In connection with any such controversy, the prevailing party is entitled to recover his/her/its costs, including reasonable attorneys fees."

In September 2011, after L & S represented Cooper in an action that ended unfavorably to him, he filed a demand for arbitration against L & S with the Judicial Arbitration and Mediation Services, Inc., (JAMS), asserting claims for breach of contract, breach of fiduciary duty, and professional negligence. L & S represented itself in the arbitration. The arbitrator's interim award determined that Cooper had failed to establish his claims and that L & S was the prevailing party. After L & S sought an award of contractual fees under Civil Code section 1717, the arbitrator initially issued a "Final Award" denying that request, but later

modified the final award to include a fee award, and issued a "Revised Final Award."

After the trial court confirmed the revised final award, appellant Jeffrey Cooper noticed an appeal, contending the arbitrator exceeded his powers in modifying the final award to include a fee award (Code Civ. Proc. §§ 1286.2, subd. (a)(4), 1286.6, subd. (b)). We concluded that the arbitrator, in issuing the revised final award, contravened Code of Civil Procedure section 1284, which specifies the powers of an arbitrator to correct a final award. (*Cooper v. Lavely & Singer Professional Corp.* (2014) 230 Cal.App.4th 1, 10-21.) We reversed the judgment, and remanded the matter with instructions to the trial court to correct the revised final award by striking the attorney fee award, and to confirm the award, as corrected. (*Id*. at p. 22.) We also awarded Cooper his costs on appeal. (*Ibid*.)

In November 2014, Cooper submitted a motion for an award of contractual attorney fees under Civil Code section 1717 as the prevailing party in the appeal, as well as a memorandum of costs on appeal, which included a request for $1,718.75 in JAMS fees that Cooper incurred in opposing L & S's fee request before the arbitrator. L & S filed a motion to tax costs, which challenged the request for JAMS fees. On January 26, 2015, the court entered a judgment confirming the arbitrator's final award. In ruling on the motions relating to attorney fees and costs, the trial court denied Cooper's requests for an award of contractual attorney fees and an award of JAMS fees as an item of costs on appeal.

## DISCUSSION

Cooper contends the trial court erred in denying his requests for awards of contractual attorney fees and JAMS fees. As explained below, we disagree.

A. *Request for Contractual Attorney Fees*

We begin with Cooper's challenge to the denial of his request for a contractual fee award. He maintains that under Civil Code section 1717, he is entitled to an award as the prevailing party regarding L & S's fee request, as his legal services contract authorizes "the prevailing party" in "any . . . controversy" between the parties to recover fees incurred in connection with the "controversy."[1] (Italics deleted.) The crux of his argument is that for purposes of an award pursuant to section 1717, L & S's s fee request initiated a "discrete legal proceeding" regarding a "controversy" in which he was the prevailing party.

1. *Governing Principles*

Subdivision (a) of section 1717 provides that "[i]n any action on a contract, where the contract specifically provides that attorney's fees and costs, which are incurred to enforce that contract, shall be awarded either to one of the parties or to the prevailing party, then the party who is determined to be the party prevailing on the contract, whether he or she is the party specified in the contract or not, shall be entitled to reasonable attorney's fees in addition to other costs." Subdivision (b) of section 1717 further provides that the court "shall determine who is the party prevailing on the contract," and that absent circumstances not applicable here, that party "shall be the party who recovered a greater relief in the action on the contract."

Section 1717 has limited scope. (*Santisas v. Goodin* (1998) 17 Cal.4th 599, 615 (*Santisas*).) If an action asserts both contract and noncontract claims, the statute "applies only to attorney fees incurred to litigate the contract claims."

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[1] All further statutory citations are to the Civil Code, unless otherwise indicated.

(*Ibid*.) Thus, "in deciding whether there is a 'party prevailing on the contract,' the trial court is to compare the relief awarded on the contract claim or claims with the parties' demands on those same claims and their litigation objectives as disclosed by the pleadings, trial briefs, opening statements, and similar sources. The prevailing party determination is to be made only upon final resolution of the contract claims and only by 'a comparison of the extent to which each party ha[s] succeeded and failed to succeed in its contentions.' [Citation.]" (*Hsu v. Abbara* (1995) 9 Cal.4th 863, 876.) Generally, "a party is entitled to attorney fees under section 1717 'even when the party prevails on grounds the contract is inapplicable, invalid, unenforceable or nonexistent, if the other party would have been entitled to attorney's fees had it prevailed.'" (*Id*. at p. 870.)

As our Supreme Court has explained, section 1717 "generally reflects a legislative intent to establish uniform treatment of fee recoveries in actions on contracts containing attorney fee provisions and to eliminate distinctions based on whether recovery was authorized by statute or by contract." (*Santisas*, *supra*, 17 Cal.4th at p. 616.) Although initially enacted to apply to unilateral fee provisions, the current version of section 1717 also applies to bilateral fee provisions. (*Sears v. Baccaglio* (1998) 60 Cal.App.4th 1136, 1145-1146.) The cumulative effects of section 1717, in its current form, are described in *Walker v. Ticor Title Co. of California* (2012) 204 Cal.App.4th 363, 372: "While attorney fees awarded under a contract were, at one time, considered to be an element of contract damages [citation], that view changed with the enactment of . . . section 1717. While intended to ensure the mutuality of any contractual attorney fees provision [citation], the statute also constituted statutory authority for the award of contractual fees. Once contractual attorney fees could be deemed awarded pursuant to section 1717, courts found them analogous to statutory attorney fees

and declared them an element of costs of suit, rather than damages. [Citations.] . . ." """[Under the current version of section 1717], attorney's fees were to be seen as allowed by statute, rather than by contract."' [Citation.]" [¶] . . . [¶] "Accordingly, while the availability of an award of contractual attorney fees is created by the contract [citation], the specific language of the contract does not necessarily govern the award. In setting contractual attorney fees, '"[e]quitable considerations [under section 1717] must prevail over . . . the technical rules of contractual construction."' (Quoting *PLCM Group, Inc. v. Drexler* (2000) 22 Cal.4th 1084, 1091, 1095 (*PLCM Group*).)"

2. *Analysis*

We turn to Cooper's contention regarding the denial of his attorney fee request.[2] He argues that under section 1717, a trial court may properly award fees to a party who prevails in a "discrete legal proceeding." Furthermore, pointing to the terms of the contractual fee provision, he argues that L & S's fee motion before the arbitrator amounted to a "controversy separate and distinct from the underlying merits," and initiated a discrete legal proceeding. He thus asserts that under section 1717, he is entitled to a fee award as the prevailing party in that proceeding "because he defeated the only contract claim." As discussed below, we reject his contention because L & S's fee motion initiated no "discrete legal proceeding" for which a fee award is authorized under section 1717.

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[2] To the extent the ruling presents questions of law regarding the application of section 1717, we independently resolve those questions. (*Snyder v. Marcus & Millichap* (1996) 46 Cal.App.4th 1099, 1102.) To the extent Cooper's contention implicates the trial court's determination that he was not the prevailing party under section 1717, we review that aspect of the ruling for an abuse of discretion. (*PLCM Group, supra*, 22 Cal.4th at p. 1095.)

We find guidance regarding Cooper's contention from *Frog Creek Partners, LLC v. Vance Brown, Inc.* (2012) 206 Cal.App.4th 515, 520 (*Frog Creek Partners*), in which the appellate court held that under section 1717, there may be only a single prevailing party on a contract in a lawsuit. In so concluding, the court determined that with respect to actions on a contract, parties cannot create a broader right to contractual fees than permitted under section 1717 by incorporating into their contractual fee provision a purported entitlement to fees in circumstances other than those set forth in section 1717. (*Frog Creek Partners, supra,* 206 Cal.App.4th at pp. 544-545.)

In *Frog Creek Partners*, two parties entered into contracts containing an arbitration clause and an attorney fee provision. (*Frog Creek Partners*, *supra,* 206 Cal.App.4th at p. 520.) After the parties fell into a dispute, they filed cross-actions. (*Id*. at pp. 520-523.) One party defeated a petition to compel arbitration, but was ultimately unsuccessful in the subsequent proceedings regarding the merits of the dispute. (*Ibid*.) The trial court issued two fee awards under section 1717, one to the party that prevailed on the petition to compel, and the other to the party that prevailed on the merits. (*Frog Creek Partners, supra,* at p. 523.)

The key issue presented on appeal concerned the propriety of the fee award relating to the petition to compel. (*Frog Creek Partners, supra*, 206 Cal.App.4th at p. 520.) Following an examination of the legislative history of section 1717, the appellate court concluded thats "in any given lawsuit there can only be one prevailing party on a single contract for the purposes of an entitlement to attorney fees," and that "the party who obtains greater relief on the contract action is the prevailing party entitled to attorney fees under section 1717, regardless of whether another party also obtained lesser relief on the contract or greater relief on noncontractual claims." (*Frog Creek Partners, supra,* at p. 531.) The court

further determined that within section 1717, the term "'action on a contract'" designates "the contract claims in the lawsuit as a whole." (*Frog Creek Partners*, at p. 539; see also *Roberts v. Packard, Packard & Johnson* (2013) 217 Cal.App.4th 822, 832 (*Roberts*) ["Procedural steps taken during pending litigation are not an 'action' within the meaning of section 1717."].) In so concluding, the court noted that the term "action," though not defined in section 1717, is defined in Code of Civil Procedure section 22, which states: "'An action is an ordinary proceeding in a court of justice by which one party prosecutes another for the declaration, enforcement, or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense.'" Under that statute, the term "'action'" is ordinarily regarded as referring to "the whole of a lawsuit." (*Frog Creek Partners, supra*, 206 Cal.App.4th at p. 527, fn. 6.)[3]

Applying those determinations to the issue presented on appeal, the court concluded that the denial of a petition to compel does not constitute a separate "'action on a contract'" unless special circumstances obtain, for example, the denial constitutes the final resolution of the proceeding in which the petition is filed. (*Frog Creek Partners, supra*, 206 Cal.App.4th at pp. 535-536, 537-539.) As no such circumstances were present, the court reversed the fee award relating

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**3** As explained in *Nassif v. Municipal Court* (1989) 214 Cal.App.3d 1294, 1298: "Generally an action is defined as a proceeding wherein one asserts a right or seeks redress for a wrong. [Citation.] An action is usually deemed to commence upon the filing of a complaint [citations], and remains pending until the judgment is final. [Citation.] An action is not limited to the complaint but refers to the entire judicial proceeding at least through judgment and is generally considered synonymous with 'suit.' [Citation.] Action is not the same as cause of action. While 'action' refers to the judicial remedy to enforce an obligation, 'cause of action' refers to the obligation itself. (*Ibid.*) [¶] The courts have generally used the word 'action' to refer to the proceeding or suit and not to the cause of action."

to the denial of the petition to compel. (*Id*. at pp. 531-548; see *Roberts*, *supra*, 217 Cal.App.4th at p. 832 [reaching same conclusion on similar facts].)

In so concluding, the court declined to follow *Acosta v. Kerrigan* (2007) 150 Cal.App.4th 1124 (*Acosta*), and *Benjamin, Weill & Mazer v. Kors* (2011) 195 Cal.App.4th 40 (*Kors*), in which the courts determined that the specific language of a contractual fee provision could authorize a fee award in circumstances other than those specified in section 1717. (*Frog Creek Partners*, *supra*, 206 Cal.App.4th at pp. 535-536, 537-538.) In *Acosta*, the parties entered into a lease containing a provision mandating the arbitration of "'any dispute'" arising out the agreement, and a provision awarding attorney fees to a party forced to respond to any action -- other than an arbitration -- initiated by the other party. (*Acosta*, *supra*, 150 Cal.App.4th at pp. 1126-1127.) When the tenant filed a writ of possession, the landlord successfully sought to compel arbitration and obtained an "interim" contractual fee award as the prevailing party with respect to that matter, even though the arbitration proceeding had not concluded. (*Ibid*.) In affirming the interim award, the appellate court concluded that the fee provision supplied a basis for an award outside the scope of section 1717. (*Acosta*, *supra*, at p. 1132 & fn. 16.)

In *Kors*, the parties executed a legal services contract containing an arbitration provision and a provision entitling the prevailing party in specified litigation to recover fees "'incurred in any dispute over enforcement of [the] agreement . . . .'" (*Kors*, *supra*, 195 Cal.App.4th at pp. 75-76.) When the law firm sued the client for unpaid legal fees, the client filed a successful petition to compel arbitration. (*Id*. at pp. 47-48.) Applying the rationale stated in *Acosta*, the appellant court concluded that the client was entitled to a contractual fee award in

view of the terms of the fee provision, notwithstanding section 1717. (*Kors, supra*, at pp. 73-80.)

The appellate court in *Frog Creek Partners* rejected *Acosta* and *Kors* as contrary to the legislative intent underlying section 1717, namely, to provide uniform treatment of fee recoveries in actions on contracts. (*Frog Creek Partners*, *supra*, 206 Cal.App.4th at pp. 535-536, 544-545.) Indeed, as the court noted, our Supreme Court has stated that "'[a] holding that in contract actions there is still a separate contractual right to recover fees that is not governed by . . . section 1717 [is] contrary to this legislative intent.'" (*Id*. at p. 545, quoting *Santisas*, *supra*, 17 Cal.4th at p. 616.) Under *Acosta* and *Kors*, however, parties "could provide for an attorney fee award in *any* specified circumstance, as long as the parties did so with highly specific contractual language," and thus "render irrelevant" the definition of "'party prevailing on the contract'" stated in section 1717. (*Frog Creek Partners*, *supra*, 206 Cal.App.4th at pp. 544-546.)

In view of *Frog Creek Partners*, we conclude that insofar as the parties' litigation constituted an "action on a contract" within the meaning of section 1717, the terms of their fee provision created no right to recover attorney fees independent of section 1717. The focus of our inquiry is thus on whether under section 1717, L & S's fee motion initiated or resulted in a discrete "action on a contract" in which Cooper is properly judged to be the prevailing party. As explained below, we conclude it did not.

Cooper maintains that L & S's fee motion initiated a discrete legal proceeding in which he prevailed on the only contract-related issue, namely, L & S's entitlement to the fee award. He argues that the arbitrator's interim award resolved the merits of his claims against L & S, and that our prior decision that the arbitrator lacked authority to issue the revised final award constituted a

determination that the arbitration ended with the Final Award. He further contends that following L & S's motion to confirm the revised final award, the litigation between the parties focused solely on the fee award to L & S, and resulted in an appealable judgment affirming that award, which he successfully challenged on appeal.

Within the context of the arbitration, L & S's fee motion cannot reasonably be regarded as constituting a discrete or separate "action on a contract" under section 1717 in which Cooper prevailed. Assuming -- without deciding -- that an arbitration that commences without judicial intervention may be viewed an action for purposes of section 1717, L & S's fee request was not the sole contract-based issue raised in the arbitration, as the claims ultimately presented to the arbitrator included a claim "on the contract."[4] Thus, the interim award, which identified L & S as the prevailing party regarding Cooper's claims, merely failed to resolve one of the contract-related questions potentially at issue in the proceeding. Although the Final Award decided that issue against L & S, it provided that L & S was the prevailing party in the arbitration, as did the revised final award, which authorized a fee award. Accordingly, within the arbitration, L & S's fee motion initiated no discrete "action on a contract" in which Cooper was the prevailing party.

We therefore turn to whether Cooper was the prevailing party in a discrete action related to the confirmation proceeding or the appeal. L & S's fee request did not constitute a separate "action on a contract" within L & S's proceeding to

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[4] Cooper asserted at least one claim "on the contract," namely, a challenge to the enforceability of the legal services contract (Bus. & Prof. Code, § 6148). (See *Eden Township Healthcare Dist. v. Eden Medical Center* (2013) 220 Cal.App.4th 418, 426-428.)

confirm the revised final award. As explained in *MBNA America Bank, N.A. v. Gorman* (2006) 147 Cal.App.4th Supp. 1, Supp. 7- Supp. 8, for purposes of section 1717, a confirmation proceeding *itself* is an "action[] on a contract" when undertaken pursuant a mandatory arbitration provision in the parties' contract, as it constitutes "an attempt to enforce a term of the contract." Accordingly, L & S's confirmation proceeding was an action on the contract encompassing the fee request as an aspect of the contract claim at issue. Indeed, the original judgment reflected that L & S's motion to confirm revised final award -- which included rulings on Cooper's claims and L & S's fee request -- had been granted.

Cooper's appeal from the original judgment confirming the revised final award does not constitute a "action on a contract" separate from the confirmation proceeding. In *Wood v. Santa Monica Escrow Co.* (2009) 176 Cal.App.4th 802 804 (*Wood*), the defendant in an action sought a contractual fee award after the dismissal of the plaintiff's complaint. When the trial court denied the award, the defendant noticed an appeal from the ruling. (*Id*. at p. 805.) After the appellate court affirmed that ruling, the plaintiff sought a contract-based award of the fees incurred on appeal, which the trial court denied on the ground that the defendant was the prevailing party in the action. (*Ibid*.) In affirming that ruling, the appellate court concluded that "section 1717 does not support an award to the prevailing party on appeal, but only to the prevailing party in the lawsuit." (*Wood*, *supra*, at p. 808.)[5]

The remaining issue is whether the trial court properly determined that Cooper was not the prevailing party in the confirmation proceeding. Although

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[5] Cooper suggests that the appealability of a ruling on a claim for contractual attorney fees, by itself, establishes that the claim constitutes a "discrete legal proceeding," for purposes of a fee award under section 1711. In view of *Wood*, that contention fails.

Cooper's prior appeal secured a correction to the judgment that eliminated the fee award to L & S, that award was only an aspect of that action on the contract. As L & S obtained a judgment in its favor on the merits of Cooper's claims, L & S fully achieved its fundamental aims in the litigation. We therefore see no error in the trial court's ruling.

Pointing to *Acosta*, *Kors*, and several other decisions, Cooper contends that under the terms of the fee provision, he is entitled to a fee award as the prevailing party in a discrete legal proceeding. As we find *Frog Creek Partners* persuasive, we decline to follow *Acosta* and *Kors*.[6] The remaining decisions are distinguishable. In each case, the appellate court held that although the parties were engaged in -- or potentially could engage in -- two or more actions arising out of a contract, section 1717 authorized a fee award in one action because it constituted a discrete legal proceeding, in view of the fact that a party secured an appealable final order or judgment in its favor resolving *all* the contract claims raised in the action. (*Otay River Constructors v. San Diego Expressway* (2008) 158 Cal.App.4th 796, 806-807 [party that successfully opposed petition to compel

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**6** Cooper also purports to find support from *Calvo Fisher & Jacob LLP v. Lujan* (2015) 234 Cal.App.4th 608, 621-628, in which the appellate court affirmed a contract-based attorney fee award to a party that had prevailed on contract and tort claims, concluding that the claims were sufficiently intertwined to resist apportionment of the fees incurred in litigating them. In so concluding, the court rejected a contention that section 1717 necessarily limited any recovery of fees to those incurred in connection with the contract claims, stating that the contractual fee provision, not section 1717, was "the basis for . . . [the] fees." (*Calvo, supra,* 234 Cal.App.4th at pp. 620-621.) We do not disagree with that statement, as it is well established that section 1717 does not create the right to a fee award, but regulates awards within its scope (*Walker*, *supra*, 204 Cal.App.4th at p. 372). Nothing in *Calvo*, however, supports Cooper's contention that L & S's fee motion initiated a discrete "action on a contract" under section 1717 in which Cooper was the prevailing party.

arbitration was entitled to fee award, as the denial was final appealable order regarding the sole claim asserted in the proceeding, namely, the request to enforce the arbitration provision]; *Turner v. Schultz* (2009) 175 Cal.App.4th 974, 983-985 [parties that secured favorable final judgment on contract-related claims for declaratory and injunctive relief were entitled to fee award because they constituted only claims asserted in the action]; *Food Safety Net Servs. v. Eco Safe Sys. USA, Inc.* (2012 ) 209 Cal.App.4th 1118, 1136-1138 [section 1717 authorized fee award to party that secured summary judgment on its contract claims, even though adversary's cross-complaint was unresolved, as the summary judgment resulted in reclassification of the action as a limited civil case, and thus amounted to appealable final judgment in the unlimited civil action].) In contrast, Cooper prevailed solely on an aspect or element of the contract claim at issue in the confirmation proceeding. Accordingly, as the trial court correctly determined that Cooper was not the prevailing party on the contract in the confirmation proceeding, he was not entitled to a fee award under section 1717.

B. *Request for JAMS Fees*

Cooper also contends the trial court erred in denying his request for $1,718.75 in JAMS fees he incurred in opposing L & S's fee request before the arbitrator, which he identified as an item of costs in his memorandum of costs on appeal. He argued that the arbitrator, in issuing an award of costs to L & S in the revised final award, improperly included the JAMS fees that L & S incurred in connection with its "baseless" fee motion. The trial court denied Cooper's

request, stating that California Rules of Court, rule 8.278(d)(1), which enumerates the items recoverable as costs on appeal, does not encompass JAMS fees.[7]

On appeal, Cooper maintains that because our prior decision concluded that L & S was not entitled to an attorney fee award, he "should be allowed to claim the JAMS fees . . . related to L & S's motion for attorney fees." As the trial court correctly noted, however, the JAMS fees are not recoverable as costs on appeal. Accordingly, his contention fails.

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[7] California Rules of Court, rule 8.278(d)(1) provides that a party may recover only the following costs on appeal, "if reasonable": (A) Filing fees; [¶] (B) The amount the party paid for any portion of the record, whether an original or a copy or both. The cost to copy parts of a prior record under rule 8.147(b)(2) is not recoverable unless the Court of Appeal ordered the copying; [¶] (C) The cost to produce additional evidence on appeal; [¶] (D) The costs to notarize, serve, mail, and file the record, briefs, and other papers; [¶] (E) The cost to print and reproduce any brief, including any petition for rehearing or review, answer, or reply;[¶] (F) The cost to procure a surety bond, including the premium, the cost to obtain a letter of credit as collateral, and the fees and net interest expense incurred to borrow funds to provide security for the bond or to obtain a letter of credit, unless the trial court determines the bond was unnecessary; and [¶] (G) The fees and net interest expenses incurred to borrow funds to deposit with the superior court in lieu of a bond or undertaking, unless the trial court determines the deposit was unnecessary."

## DISPOSITION

The orders of the trial court are affirmed. L & S is awarded its costs on appeal.

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**

MANELLA, J.

We concur:

EPSTEIN, P. J.

WILLHITE, J.